

The record before the Appeals Board and the parties' stipulations are the same as those identified in the original May 21, 1996 Award by the Special Administrative Law Judge, together with the transcript of the June 18, 1998 proceedings, the exhibits attached thereto, and the pleadings and documents contained in the administrative file.

ISSUES

The issues as stated in respondent's Application for Review by Workers Compensation Board are as follows:

- 1.) Did the Administrative Law Judge err by not allowing respondent and insurance carrier to be relieved from paying all amounts that were properly stayed from payment during the pendency of its appeal in the Award on Review and Modification?
- 2.) Did the Administrative Law Judge err by finding that claimant was entitled to penalties and attorneys fees on her Application for Penalties?
- 3.) All issues decided by the Administrative Law Judge against respondent and insurance carrier.

FINDINGS OF FACT

(1) Claimant injured her low back in a fall at work on August 10, 1993. The parties stipulated to the compensability of the claim and to a 14.5 percent functional impairment. Claimant alleged she was entitled to a work disability that exceeded her percentage of functional impairment. The case was tried and submitted to the Administrative Law Judge for a decision on the nature and extent of claimant's disability. Respondent's evidence was completed July 6, 1995, and its terminal date was August 6, 1995. Claimant's submittal letter was filed July 11, 1995, followed by respondent's submittal letter on August 18, 1995. Claimant also filed a submission brief on September 27, 1995. Respondent was unable to accommodate claimant's restrictions. As of the date the evidentiary record closed, claimant had not worked for respondent since June 10, 1994. Although claimant subsequently worked for another employer, as of the close of evidence in the original case and when the matter was submitted to the Administrative Law Judge for determination, claimant was unemployed and had not worked anywhere since February 1995.

(2) A special administrative law judge awarded claimant a 25 percent work disability on May 21, 1996. The Appeals Board entered its award for a 59.5 percent work disability on December 17, 1996 based upon a 25 percent task loss and a 100 percent wage loss less a 3 percent preexisting impairment. The Board's decision was appealed to the Kansas Court of Appeals which affirmed the Board's decision on April 10, 1998.

(3) Claimant served a demand upon the respondent and insurance carrier on April 14, 1998 for payment of all monies due and owing under the award as modified by the Workers Compensation Appeals Board.

(4) Respondent never asked claimant before filing its motion for review and modification whether claimant's employment status had changed since the August 6, 1995 close of evidence in the original litigation of the claim. But sometime during this period respondent received information that claimant had become employed and, on May 12, 1998 respondent filed its motion for review and modification of the award. Claimant worked at Abilene Sterling House from February 17, 1996 until October 2, 1997 when she voluntarily quit her employment. Her earnings during this time were at least 90 percent of her average weekly wage in this case. Claimant stipulated that she is limited to her functional impairment of 14.5 percent less the 3 percent preexisting or 11.5 percent for the period of time commencing six months prior to the date respondent filed for review and modification of the award. Respondent's motion was filed May 12, 1998 and November 12, 1997 would be six months before the filing date.

(5) Claimant's application for penalties was filed on May 6, 1998. This was followed by respondent's application for review and modification filed May 12, 1998. Both applications were heard by Administrative Law Judge Bryce D. Benedict on June 18, 1998. He then issued two decisions. He ordered that the permanent partial disability award be modified from 59.5 percent to 11.5 percent effective November 12, 1997. The Administrative Law Judge also assessed penalties against respondent in the amount of \$100 per week beginning April 14, 1998 and continuing "until such time it has tendered in full the amount of the Award determined by this Court in the review and modification proceeding." Respondent appealed both orders.

CONCLUSIONS OF LAW

Review and Modification

Respondent argues the ALJ erred by not relieving it of responsibility for payment of permanent partial disability benefits for the period before November 12, 1997. K.S.A. 44-528(d) provides:

Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Based upon the above language, the Administrative Law Judge found the effective date of the Award on Review and Modification was November 12, 1997, six months prior to the date respondent's motion for review and modification was filed. Respondent's contention is that the permanent partial disability compensation that was payable to claimant for periods of disability preceding November 12, 1997 but which had not been paid during the pendency of the appeals pursuant to the stay provisions of K.S.A. 1998

Supp. 44-551(b)(2)(B) and K.S.A. 1998 Supp. 44-556(b) are likewise subject to modification under K.S.A. 44-528. Respondent's argument is that those amounts that were stayed during the pendency of its appeal did not become due and owing until after the issuance of the mandate by the Court of Appeals which was within the six-month period encompassed by the review and modification statute. The Administrative Law Judge rejected this argument and the Appeals Board does so as well. The provisions for a stay on certain compensation do not change the date or time period the disability benefits were intended to compensate for and therefore do not bring such compensation within the applicable six-month period for review and modification.

Respondent next argues that it would be against public policy to allow claimant to receive permanent partial disability compensation based upon a work disability award that found claimant to have no earnings and thus eligible for a 100 percent wage loss under K.S.A. 44-510e when in fact claimant was working for wages equal to 90 percent or more of her average weekly wage. Respondent points to K.S.A. 1997 Supp. 44-5,120(d)(4)(B) which makes it a fraudulent or abusive act or practice for an employee to obtain payment of workers compensation benefits by concealing a material fact. The Appeals Board agrees that this statute evidences a public policy in this state against such practices. But the Workers Compensation Act provides a remedy for respondent to obtain redress for such an offense. If claimant had an affirmative duty to report her reemployment and her failure to do so is deemed a fraudulent or abusive act or practice, then the Act provides a procedure for obtaining restitution and penalties under the fraud and abuse procedure. Public policy considerations do not require that we extend the effective date for review and modification under K.S.A. 44-528.

Penalties

Respondent makes similar arguments concerning its liability for penalties as it did for review and modification. Respondent's contention that it did not owe benefits is rejected for the reasons stated above. But the questions of law and public policy considerations respondent unsuccessfully argued for reducing its liability under review and modification are relevant to the determination of the application for penalties. K.S.A. 44-512a(a) provides in part:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due

The statute provides that when the prerequisites have been met, "the employee shall be entitled to a civil penalty." But the amount of that penalty is discretionary up to a maximum

of \$100 per week. Because respondent had some rational basis to believe the past due benefits would be disallowed in the review and modification proceeding and the determination on the respondent's arguments on review and modification was not made until after the hearing on claimant's motion for penalties, the Appeals Board finds the amount of penalties should be reduced from \$100 per week to \$1.00 per week. In so finding, the Board has also taken into consideration the weekly payments respondent made during the pendency of the appeal and which respondent continued to pay after the issuance of a decision by the Court of Appeals. Also, the starting date of those penalties will be May 10, 1998 which is the effective date for the memorandum opinion of the Court of Appeals.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award on Review and Modification entered by Administrative Law Judge Bryce D. Benedict dated June 22, 1998, is affirmed and the Order for penalties is modified to order respondent to pay penalties in the amount of \$1.00 per week from May 10, 1998 until such time as respondent and its insurance carrier have tendered in full the amount of the December 17, 1996 Order entered by the Appeals Board as modified by the Award on Review and Modification.

The Appeals Board adopts all other findings, conclusions and orders of the Administrative Law Judge to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Jeffrey A. Chanay, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director